No. 11803

In The United States Circuit Court of Appeals

For the Ninth Circuit

JOHN BARCOTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

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STATEMENT OF THE CASE

Although we believe that numerous assertions in appellee's statement of the case are unsupported by the record, limitations of space prohibit our detailed discussion of them. However, at the bottom of Page 7 of appellee's brief, counsel, referring to the testimony of defense witness Birch, an accountant, state:

> "He arrived at a net worth figure substantially in excess of that determined by Mr. Swanson, the Internal Revenue Agent, but his computation also showed that Barcott had understated his income for tax purpose by $43,686.18. (R. 397.)"

and would have the court believe that this is some sort of an admission by the defendant's witness as to the defendant's culpability. This statement in appellee's brief completely overlooks the whole character of Birch's testimony, which starts on Page 362 of the record, in which Barcott's financial history is developed, commencing with the year 1919 and down through and including the years of the Indictment, and it completely ignores the fact that the testimony quoted by counsel refers to the earlier testimony that Barcott must have had a much greater net worth in 1943 than that stated by the Government's accountant. Birch's testimony refers to the fact that for years and up to the year 1936, Mrs. Barcott, the appellant's wife, made substantial sums in tips which were not reported because of ignorance; it refers to the fact that Mrs. Barcott brought a substantial sum into the community when she married Barcott; and it refers to a settlement received by Mrs. Barcott as the result of a personal injury action. The fair import of Birch's testimony in this regard is that there was a difference in the net worth analysis of the two accountants, and at the very most this testimony could only refer to unreported income prior to the years of the Indictment. It does not refer to nor can it reasonably be construed to refer to admission by Birch that there was unreported income during the years charged in the Indictment.

In support of our conclusions on this point, we have set forth in the Appendix hereto numerous excerpts from the records containing the verbatim testimony of the witness Birch. (See Appendix I.)

ARGUMENT

SUFFICIENCY OF THE EVIDENCE

Counsel's argument fails to show that there is sufficient evidence upon which to base a conviction. Out of a 483-page record they have gleaned a scant half dozen lines of testimony and in effect, say: "Here is our evidence of the corpus delicti." Let us examine this testimony as the same is set forth on Pages 8 and 9 of appellee's brief. We are setting out the testimony in full in the Appendix. (See Appendix II.) The answer to the first question set forth merely states that the witness Swanson assumed that the bonds were purchased on the date they bore issue. Hardly a startling conclusion. The next question is answered by the statement that Swanson assumed the money came from the business. It does not state during what years. The witness knew that Barcott had been in business continually since 1919. Then followed two questions of an inconsequential nature, and lastly the statement that "We inquired from Mr. Barcott, he was asked numerous times after the first contact if he had any other income," and surprisingly enough there is no answer at all vouchsafed by Mr. Swanson as to what answers he received from his inquiries. The record is absolutely silent as to any further answers to Mr. Swanson's questions, and Mr. Swanson supplies no further information. We are still in the dark as to how this testimony set out by counsel on Pages 8 and 9, by even the greatest stretch of the imagination, shows any evidence at all of the corpus delicti.

The above testimony places no bottom or foundation to the estimate of net worth, nor the alleged increase thereof during the years 1943, 1944 and 1945, so counsel for the appellee has set forth on Page 9 a brief portion of the testimony of Internal Revenue Agent Neilsen. Let us look at the alleged statements of Barcott as reported in narrative form by the witness Neilsen.

Here is Neilsen's entire testimony in that regard, (R. 72):

> "Q. Just state what that discussion was.
>
> "A. I told Mr. Barcott the purpose of investigating such transactions was to determine if the money was used in black market activities, and if the money was properly reported for income tax purposes, and he said 'Well,' he said, 'I have always filed income tax returns in the operation of my restaurant, and I ordinarily accumulate five or six thousand dollars, and purchase United States Savings bonds,' but the particular transaction we were talking about, he said, 'I accumulated the ten thousand dollars to make a loan to a friend who is going to buy a boat, one Mike Kazulan. However, the transaction did not materialize so I now have the ten thousand dollars.' "

In the above excerpt Barcott is reported to have stated that he always filed income tax returns in the operation of his restaurant. It is well to keep in mind that Neilsen does not say what they were talking about until he subsequently used the words "but the particular transaction we were talking about * * *", after which they proceeded to discuss the currency and not the war bonds. Now from Barcott's statement where

is there any evidence of any increased net worth here? No one can deny that he operated the restaurant since 1919, and he has always filed income tax returns as required from 1919 to 1943. How can this possibly be deemed an admission of increased net worth during the years 1943, 1944 and 1945? Then Neilsen has Barcott saying that he, Barcott, ordinarily accumulated five or six thousand dollars and purchased United States Savings bonds. Again it must be borne in mind that at that time they were discussing the currency and not the bonds — otherwise Neilsen would have prefaced his account of the conversation with some statement as to what the parties were talking about. There is nothing at all — not one single syllable of testimony to indicate that Barcott was referring to income derived during the years charged in the Indictment or to even the bonds purchased in those years. The record shows that Barcott had been purchasing bonds since 1936 regularly, and Neilsen in his narrative account of the conversation does not mention any questions he asked Barcot, nor any answers received in response to any queries. The reported conversation is utterly without a predicate and when considered in its entirety and in relation to the other testimony, is merely a reported statement that Barcott from time to time purchased war bonds. We cannot see how such testimony in any way is an admission by the defendant that during the years charged in the Indictment his net worth increased by an amount sufficient to equal the unreported income charged in the Indictment.

APPELLEE'S AUTHORITIES PURPORTING TO SHOW SUFFICIENCY OF THE EVIDENCE

In attempting to prove that the evidence offered by the Government made out a prima facie of guilt against the defendant, appellee cites five cases, which are the following:

Gleckman v. United States, 80 F. (2d) 394 (C.C.A. 8).

Malone v. United States, 94 F. (2d) 281 (C.C.A. 7).

Guzik v. United States, 54 F. (2d) 618 (C.C.A. 7).

United States v. Johnson, 123 F. (2d) 111 (C.C.A. 7).

Murray v. United States, 117 F. (2d) 40 (C.C.A. 8).

The foregoing cases have three general premises in common, which are as follows:

1. In every case the defendant was engaged in a criminal enterprise.

2. In each of these cases there was some evidence of money received during the fiscal which was *not* reported.

3. In each of the cases where net worth was used to corroborate the evidence already introduced, the increase in net worth was precisely bottomed on a known figure at the beginning of the taxable period.

None of these three general premises are present in the case at bar.

THE GLECKMAN CASE

Gleckman was a St. Paul "merchant" with extensive holdings in distilleries in both Cuba and Canada. He also had various other holdings and rental property in St. Paul. He kept no record of his accounts. He made no tax returns prior to 1928. In 1928 he consulted an Assistant U. S. Attorney concerning the payment of tax on illegal liquor transactions. He then for the first time made returns for 1925, 1926 and 1927. He also received profits from sales of stocks and bonds and received rents. He drew a salary from one concern and shared in the profits of another as a partner. He specifically understated his salary and reported none of the profits from the partnership. Investigation revealed large sums of money received and deposits made during 1929 and 1930, not reported or otherwise disclosed. $15,000 was received and deposited by him in a bank account under an assumed name. In one of the years unexplained deposits of $92,000 were made and used for Gleckman's own purposes. He also made excess tax payments in 1929. Two financial statements were introduced in evidence wherein defendant stated that they were true and correct statements of his financial condition. On October 29, 1929, the first statement showed net worth of $64,200. On March 25, 1930, the second statement showed net worth of $217,373. The court said as follows:

> *"We think there was in this case substantial circumstantial evidence that Mr. Gleckman did have a business outside of that described in his return and that at least some of his deposits were*

> *derived from it. * * * and the only fair inference is that he was engaged in illegal liquor transactions.*" Page 399. (Italics ours.)

As to the property statements, the court said as follows:

> "An analytical comparison between the two statements make it clear that there were omissions in the first statement of property included in the second, and substantially different valuations were made of the same properties — those in the second statement being higher. But notwithstanding all allowances, the two property statements afforded *some testimony* of largely increased net worth between the two dates." Page 399. (Italics ours.)

Concerning the excess payments of tax in 1929, the court said:

> "Although the mere payment of the excess assessment made against him for 1929 might not, of itself, have afforded very convincing proof that he believed he owed the tax, the circumstances under which the amount was computed by his own agent and the tax was paid by him before assessment tended to show that the moneys deposited in the banks were received by Mr. Gleckman *as income from business.*" Page 400. (Italics ours.)

In summation, the court reached the conclusion that a *prima facie* case had been made out, using the following language:

> "The bank deposits and large items of receipts by Mr. Gleckman do not, therefore, stand entirely alone as the sole proof of the existence of a tax due from him, but they are identified with business carried on by him and so are sufficiently shown to be of a taxable nature." Page 400.

The distinctions between the Gleckman case and the case at bar are readily apparent. Gleckman was not convicted on the mere showing that his net worth increased during the taxable years, as the court said the *financial statements afforded some testimony of larger increased net worth.* Thus evidence of defendant's net worth during the period was founded on a known net worth as evidenced by financial statements. In our case net worth at the beginning of the year 1943 is merely assumed from an examination of defendant's known assets conducted in the year 1946. Other distinguishing features of the Gleckman case are apparent:

He was engaged in an illegal business and reported no profits whatsoever therefrom; he understated his reported salary and reported nothing from a partnership; he kept no records whatsoever; his bank deposits were withdrawn from day to day for his own convenience and use; and he voluntarily paid additional tax in 1929 before assessment was made, indicating there was income from an unreported source.

Appellant herein was not engaged in any illegal enterprise and he reported income for the years in question totalling nearly $40,000. The importance of this reported income cannot be disregarded in a case of this character, for as was said in *United States v. Johnson,* 123 F. (2d) 111, Page 124:

> "If Johnson had reported no income for those years, a different situation would have been presented. We have no hesitancy in holding that the verdict cannot be supported upon this theory."

Where in the *Gleckman* case defendant kept no records at all, in the case at bar appellant kept a day to day record of his business. Only the first six months of the year 1943 were not available, and the appellee by stipulation concedes that this loss was through no fault of the appellant. (R. 401.) We have set forth this stipulation in the Appendix. (See Appendix III.)

THE MALONE CASE

In *Malone v. United States*, 94 F. (2d) 281, defendant was a member of the Illinois State Tax Commission and it was established by evidence that he received bribes during the taxable years from various corporations. None of this money was accounted for in the income tax returns. The appellate court determined that the vast amount of money which he received during these years could be attributed to an illegal and unreported source and that large amounts of money received and deposited during the taxable year, *while of itself insufficient to convict*, under the circumstances shown by the record was rather convincing evidence in support of the charge. The court said, at Page 287:

> "We have heretofore set forth rather fully the testimony and shall not do so again. The fact that the defendant, in addition to his other reported Income, deposited in the bank such large amounts of currency on so many occasions *under the circumstances shown by this record, while of itself, not sufficient*, is nevertheless a rather convincing circumstance in support of the charge.

"It is said this language is inapplicable to the present case inasmuch as Gleckman was secretly in the illicit liquor business; that in the instant case there is no evidence of any business conducted by the defendant other than that from which defendant's income was accounted for in his returns. We do not agree with this contention. The fact is, there is evidence to support the conclusion that *defendant had a rather lucrative income in connection with his membership on the Tax Commission.* From such source, it may be concluded, he received $32,500 in 1927; $31,000 in 1928; $15,000 in 1929, and $41,000 in 1930. The fact that the final assessments against corporations from whom this money was received, were decreased, in connection with the circumstances under which the defendant received the money, was sufficient to justify a jury in believing the same was received by the defendant as bribes, and that at least a sizeable portion of the currency deposits came from such a source and constituted a part of defendant's income." (Italics ours.)

In the *Malone* case the government presented evidence of an illegal source of income received during the taxable year which was never reported. Large bank deposits made, withdrawn and used by the defendant during the year was a circumstance only to corroborate and bolster the main evidence.

In the case at bar the purchase of bonds by appellant is merely a dangling item with no other evidence to which it can become attached and to which it can be suspended. The *Malone* case further emphasizes the necessity of a foundation upon which to base net worth, an ingredient wholly lacking herein, in the following language on Page 286:

> "The government, in rebuttal, introduced in evidence the financial statement made by the defendant to Greenebaum Sons Bank & Trust Company, June 8, 1922, showing cash on hand and in bank $6,000, and also a financial statement made by the defendant to Jefferson Park National Bank on June 30, 1928, showing his cash on hand and in bank in the sum of $101.59."

The *Malone* case is not predicated on net worth but holds that net worth was merely a circumstance, and in this connection we again quote from Page 286 as follows:

> "The evidence that defendant's net worth during the years in question was increased in an amount somewhat similar to the amount of the currency deposits is not without significance."

THE GUZIK CASE

In *Guzik v. United States*, 54 F. (2d) 618, the illegal enterprise was gambling. Large bank accounts, one in an assumed name, was one of the elements introduced to corroborate evidence that the defendant received vast sums of money during the taxable year upon which he failed to report and pay tax. The court sets forth a summary of all the evidence introduced against Guzik in the following language at Page 619:

> "In order to prove gross income, and therefore probable taxable income of the appellant, the government introduced the following evidence: Bank deposits in two banks (one account was under an assumed name) totalling $953,303.93; cashier's checks cashed by appellant's physician on stock alleged to have been transferred to him by appellant in order to evade surtax; the testimony of a

> general cashier of appellant's gambling establishments that he, under the instruction of the appellant, converted surplus from the operation of a gambling business into cashier's checks (totalling $147,500), which he delivered to appellant's messenger."

On Page 16 of appellee's brief, portions of the *Guzik* case are quoted with asterisks appearing therein showing an omission. A portion of such omission reads as follows:

> "In the instant case, part of the deposits, $99,500, were identified by the witness Ries, as being net profit. There was ample evidence to warrant a jury in finding that the dividends received by Dr. Omens, amounting to $36,750, were part of appellant's income."

However, appellee does include the following language in its quotation:

> "* * * there was direct evidence to the effect that a considerable part of the large sums deposited in appellant's bank accounts came from the operation of gambling businesses in a suburb of the city of Chicago."

Net worth does not even enter into this case. The evidence is direct that the money in defendant's bank accounts came from profits from the gambling business. In one single transaction $99,500 was proven to be profit. The most Guzik ever paid in tax was on the basis of $24,000. It was not the excessivly large bank accounts upon which Guzik was convicted. This was but a circumstance connected with the other evidence of large profits taken out of the gambling business.

THE JOHNSON CASE

In *United States v. Johnson*, 123 F. (2d) 111, one of the theories upon which the government sought to convict the defendant for income tax evasion was on the basis of greater expenditures over reported earnings. Johnson was a notorious gambler as evidenced by the following quotation from Page 123:

> "Johnson admittedly was a professional gambler and had been for many years. If he had any other business of consequence, the record does not disclose it. He was not just an ordinary gambler, but one of towering stature among that fraternity. The co-defendants were admittedly in the same business. They operated brazenly and notoriously, and, so far as this record discloses, without interference or restraint during the period covered by the indictment. That the field was a fertile one is evidenced by the huge sums of money which apparently passed through their hands."

On Page 19 of its brief appellee quotes at length from the *Johnson case*. This quotation effectively supports our contention herein. The appellee apparently used this quotation for the reason that it lends some credence to the expenditure theory. What appellee has overlooked is that the court in the *Johnson* case insisted on a foundation from which it could be determined what assets the defendant owned as of a certain date.

> "This theory was sought to be established by proving a statement purported to have been made by Johnson on January 1, 1932, that he had cash on hand in the amount of $78,000." *U. S. v. Johnson*, 123 F. (2) 111.

Without evidence of a foundation upon which to build the theory cannot operate. You cannot pour water into a bottomless barrel and expect it to fill and overflow.

THE MURRAY CASE

In *Murray v. United States*, 117 F. (2d) 40, defendant was Director of Public Works of Kansas City, Mo. During the taxable year he received large sums of money from Pendergast and others as consideration for special favors. The money was not reported as income and indictment followed. Murray never denied receipt of the money in the taxable year, but claimed it was a gift and not income.

> "Defendant does not on this appeal challenge the correctness of the Government's claim as to the amount and the items of his income, nor did he do so in the lower court. He denies, however, that the excess of his receipts during the years in question over what he reported was in fact income but claims that these sums were given to and received by him as gifts." Page 42.

The lack of resemblance to the case at bar is too apparent for further argument.

PLAINTIFF'S EXHIBIT NO. 11 SHOWED ENTRY INTO A SAFETY DEPOSIT BOX

Appellant objected to the introduction in evidence of Plaintiff's Exhibit No. 11, the safety deposit slip purporting to show that appellant entered the box shortly after his interview with the agent Neilsen, on the grounds of incompetency, irrelevancy and imma-

teriality. (R. 104.) The error of allowing this evidence to go before the jury is epitomized in appellee's own argument to this court on Page 26 of their brief:

> "In view of the defendant's admitted accumulation of large sums of currency in his safety deposit box, and business safe, these unexplained entries into this second box were circumstances pertinent to the issue of withholding and secreting income."

This inflammatory and prejudicial evidence was not limited to the introduction of the exhibit but was enlarged and made indelible in the minds of the jury by arguments of counsel to the jury. (R. 417, 420, 432, 433.)

Of what possible relevancy could this testimony be? No evidence was submitted to connect up the contents of the box. It was never claimed that the government was seeking undisclosed assets. Indeed, the whole government case is predicated upon assets known, counted and particularly described, right down to the last penny. If we view the evidence in its entirety, of what possible relevancy could it be that appellant went to one, two or a dozen safety deposit boxes, unless the appellee could show by circumstances that lost or concealed assets which it was following were traced thereto and vanished into the void at that point on the trail.

There are numerous cases illustrative of the principle set forth in appellant's opening brief to the effect that evidence without probative value is inadmissible.

Among these is *Steinberg v. United States*, 14 F. (2d) 564 (C.C.A. 2), where the following appears at Page 567:

> "The fundamental object of the prosecution was to show that Steinberg during 1921 received income — i.e., made gains — from liquor sales. Presumably to that end there was admitted in evidence a photostat of some or all (we cannot be sure which) of the pages of an account or memorandum book, found by a visitor to Steinberg's office during the latter's absence, behind a row of books standing in a bookcase * * * But the book was most injurious, because (if for no other reason) some entries suggested that bribes had been paid to prohibition or 'revenue' officials. No legal question will be served by dwelling on this document * * *; under the circumstances we think it was serious error to admit, because *it was not probative* and was inflammatory." (Italics ours.)

In the case of *State v. Powell*, 245 Pac. 128 (Kan. 1926) where the defendant was being prosecuted for the felony of knowingly accepting bank deposits after a bank had become insolvent, and where the contested issues were whether the bank was insolvent and Powell, as vice-president, knew it was insolvent, there having been substantial evidence admitted to show that over a period of years the bank assets had been misappropriated by its officers, and it having been shown that Powell's salary as vice-president was $200 per month, evidence offered and objected to that Powell owned and resided in a home worth $20,000 was held impertinent and irrelevant to the issues in the case and reversible error.

CONCLUSION

From the foregoing arguments, we submit to this Honorable Court that the appellee has been unable to defend its position in this cause. May we respectfully suggest that the language originally expressed in the case of *Crain v. United States*, 162 U. S. 625, 644, 16 S. Ct. 959, 40 L. Ed. 1097, and subsequently repeated in the case of *United States v. Johnson*, 123 F. (2d) 111 (C.C.A. 7) is most appropriate here:

> "* * * nor ought the courts, in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken * * *."

Respectfully submitted,

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APPENDIX I

EXCERPTS FROM TESTIMONY OF ROBERT E. BIRCH

Record 367:

"Q. So then, this statement that you have prepared carries the amount which was allowed to be exempt from law?

"A. That's right.

"Q. And those years he paid the taxes, did you figure the amount of tax that he paid, and did you figure the amount that he earned that year?

"A. That's right.

"Q. Now, each of these years, you have you say, accumulative, accumulating from year to year?

"A. That's right."

Record 368 and 369:

"Q. What was the amount of Mrs. Barcott's earnings during that period, of you say, twenty years, or nineteen years?

"A. We took it on a basis of sixteen years.

"Q. Sixteen years?

"A. There has been a total of thirty-six thousand dollars.

"Q. And what was the total amount then, between the two earnings, the earnings of the business and Mrs. Barcott as her own individual tips, without considering any wages she was paid?

"A. For the full time 1919 through —

"Q. Yeah.

"A. — 1945?

"Q. Yes.

"A. That would be a hundred and sixty-six thousand, two hundred and thirty-seven dollars and fifty-three cents."

Record 373 and 374:

"A. Well, we examined the bank—we obtained a list of the time of certificate of deposits the bank had, the National Bank of Washington, for the years 1937 through 1943; we examined his U. S. Savings Bonds, series D, E, and G; we went down to his safe deposit box, we hadn't examined that, and obtained the amounts to the issue dates of the various years. Those were for the years 1940 through 1945. His U. S. Bonds, series B, the information was obtained from a tax file of another firm of accountants here in town. We examined the savings account at the Pacific First Federal Savings and Loan. That ran from 1930 through 1945. The Alpha Corporation was from 1935 to 1945. The savings account at the National Bank of Washington was examined, that was from 1937 to 1945. The savings account at the Tacoma Savings and Loan Association was examined from 1927 — I believe that was closed out in 1931. The boat 'Ranger,' the cost of that was obtained from Mr. Barcott. The real estate contract, that was for his son Anton, was examined, that was for the years 1937 to 1945. Conditional sales contract with his son Anton was examined from 1937 through 1945. The investment in the California Oyster House, the information was obtained from Mr. Barcott."

Record 374 and 375:

"A. Well, in 1919 — do you want his net worth or just —

"Q. Yeah, the net worth each year.

"A. All right. In 1919 the net worth increased two hundred and fifty dollars. In 1920, it increased thirty-seven hundred dollars, that's over 1919.

"Q. In that increase does that take in consideration the tips of Mrs. Barcott, or does it not, which?

"A. In 1920?

"Q. Yeah. 1921, and 1920.

"A. Yes, it starts with 1920, it does take into consideration."

Record 376, 377 and 378:

"Q. Now will you give us his total net worth by year, as cumulative? Starting from 1920 to 1919 without the five thousand.

"A. All right. In 1919 it was fifty-two fifty — these are consecutive years, I won't read the years —

"Q. Yes.

"A. Eighty-nine fifty, that's eight thousand nine hundred and fifty dollars; twelve thousand eight hundred and fifty dollars; sixteen thousand five hundred dollars; nineteen thousand six hundred and fifty dollars; twenty-three thousand two hundred dollars; twenty-eight thousand six hundred and fifty dollars; thirty-four thousand one

hundred dollars; thirty-nine thousand five hundred and fifty dollars; forty-five thousand; fifty-two, eight fifty-one, ninety-three; fifty-eight, three O one, ninety-three; sixty-four, three fifty-one, ninety-three; sixty-eight, seven O one, ninety-three; seventy-three O fifty-one, ninety-three; seventy-seven, four O one, ninety-three; eighty-one, seven fifty-one, ninety-three; eighty-four, two sixty-five, sixty-eight; eigthy-three, four fifty-six, eighty-seven; eighty-five, eight O three, fifty-eight; eighty-seven, nine O three, fifty-eight; ninety-one, four ninety-four, eighteen; ninety-four, three forty-one, sixty-seven; ninety-nine seven thirty-three, twenty-one; and 1943 it was a hundred and eleven thousand, two thirty-four, fifty-three; '44 it was a hundred and nineteen, six sixty-one, seventy-six; and '45 it was a hundred and twenty-nine thousand two hundred and fifty-two dollars and ninety-nine cents.

"Q. What was it at the end of the year 1942?

"A. At the end of nineteen hundred and forty-two it was ninety-nine thousand, seven thirty-three, twenty-one.

"Q. And that was his net worth at that time?

"A. That's right.

"Q. After you deducted all the living expenses. Is that true?

"A. That is correct.

"Q. And now —

"THE COURT: Why don't you carry that through '43 — or '44 and '45?

"Q. What was it in 1944, at the end of the year 1944?

"A. It was a hundred and nineteen thousand, six sixty-one, seventy-six.

"Q. And at the end of the year 1945?

"A. A hundred and twenty-nine thousand, two fifty-two, ninety-nine.

"Q. Now, have you checked the number of bond and the amount of United States bond that Mr. Barcott has?

"A. We did on the series D, E and G.

"Q. Well, did he have any other bond?

"A. He had some series B bonds.

"Q. When were they purchased?

"A. Well, they were purchased in 1936.

"Q. '36. And the total amount of bond, how much did he have? What become of the 1936 bond, the series B?

"A. Those were cashed.

"Q. When were they cashed?

"A. I believe in 1946.

"Q. '46. That didn't include in this report. In 1945, then, how many United States bond did he have? '45, at the end of 1945.

"A. At the end of '45 he had seventy-eight thousand, four hundred and fifty dollars.

"Q. In United States bond. In adding all his asset, what other property did you take in consideration?"

Record 397:

"Q. And you'd stake your reputation as a certified public accountant, on that statement?

"A. A possibility, that is correct.

"Q. Now taking all the figures that you've put together here with all these seven dollars and a half every day over all these years, and down to the item in exhibit number three, you still show an understatement of income, don't you? That they are still liable in income tax.

"A. No, I wouldn't say that.

"Q. Well, don't you show a difference of forty-three thousand, six hundred and eighty-six dollars and eighteen cents, which is an understatement by them —

"Oh, I see what you mean. Excuse me, I didn't quite understand.

"Q. Isn't that correct?

"A. Yes, that's right."

APPENDIX II

EXCERPTS FROM TESTIMONY OF HARRY O. SWANSON

Record 136 and 137:

"Q. And after you examined the date, you assumed that Mr. Barcott, all he had in that box in December 31, 1942, was $23,000?

"A. That's right.

"Q. You had no other information but your own assumption.

"A. That's right.

"Q. Then the bonds were purchased after January 1, 1943? The bonds that you inventoried were purchased after January 1, 1943?

"A. No, sir, that's not quite true. We inventoried all that were in the box, some were purchased prior to that date.

"Q. Some were purchased prior to that date, and some were purchased prior—after that date?

"A. Yes, that's right.

"Q. Those who were purchased prior to that date, you assumed that he had them before January 1, 1943?

"A. We — from the issue date we determined they were purchased at a certain time, and if they were issued prior to January 1, 1943, we assumed they were purchased prior to January 1, 1943.

"Q. And what he purchased after January 1, 1943, then you assumed he purchased on that time?

"A. At the issue date, yes, sir.

"Q. Issue date. And you assumed that he got that money from the business?

"A. Yes, I had no other knowledge.

"Q. You had no other knowledge, you made no other inquiry?

"A. I made other inquiry, yes, sir.

"Q. Where did you inquire?

"A. We inquired from Mr. Barcott, he was asked numerous times after the first contact if he had any other source of income.

"Q. Just asked the sources of income?

"A. That's right.

"Q. Did he tell you that he had been in business since 1919?

"A. That's right.

"Q. That he, his wife, and his son, operate the restaurant since 1919 continuously, the California Oyster House?

"A. I am not sure about the other members of his family, but he said that he had operated the restaurant —

"Q. Didn't he say he and his wife and the two sons operate it?

"A. He said his wife had been there part of the time."

APPENDIX III

STIPULATION CONCERNING BUSINESS RECORDS

Record 401:

"MR. POMEROY: There was a stipulation to be agreed upon, and also I would like to call Mr. Barcott back for a few more questions.

"The stipulation is to the effect that Thomas F. Ray was a qualified attorney engaged in the

practice of the law in the City of Tacoma, from 1906 until his death in 1944; and John Barcott was a client of Mr. Ray for a period of about fifteen years, beginning about 1928; that about May, 1943, Mr. Ray removed all of his office records and files from his office in the Puget Sound Bank Building, Tacoma, to his daughter's home near the Lakeside Boat Club, American Lake; and that after his death, sometime up until the present time, these files have become lost, scattered, or destroyed."

"MR. HALE: There is a stipulation between counsel for both sides, if Your Honor please."

"THE COURT: Very well, the stipulation will be entered as a fact. The Court heard the reading of the stipulation in reference to Mr. Barcott's employment, and what records Mr. Ray had during that time was lost after the death of Mr. Ray. That is a statement of fact."

COLLOQUY BY COUNSEL

Record 402:

"MR. GAGLIARDI: I have Mr. Birch for a little further testimony, Your Honor. I had forgot a few questions concerning dividends and interest, which I didn't question him. Mr. Birch, will you—

"MR. POMEROY: Well, I'll stipulate that he has dividends and interest and they are approximately the same as what we have in there.

"MR. GAGLIARDI: And that it is reported in the income tax —

"MR. POMEROY: It is reported."